

In the Supreme Court

Appeal from the Court of Appeals and
the Circuit Court for the County of Genesee
appealed from Judge Richard Yuille

MARIAN T. ZSIGO-Plaintiff/Appellant,

Docket No. 126984

V

HURLEY MEDICAL CENTER-Defendant/Appellee.

REPLY BRIEF ON APPEAL-APPELLANT

ORAL ARGUMENT REQUESTED

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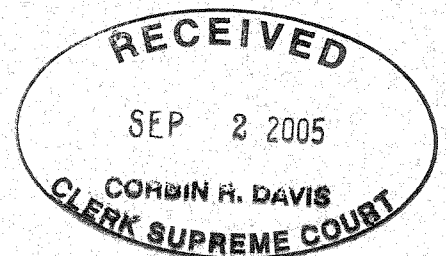


TABLE OF CONTENTS

INDEX OF AUTHORITIES.....	iii
I. REPLY ARGUMENTS.....	1
A. THE MICHIGAN COURT OF APPEALS ERRED IN HOLDING THAT, WHERE THE TRIAL COURT TOOK THE FACTS IN THE LIGHT MOST FAVORABLE TO PLAINTIFF, A FACT QUESTION WAS NOT RAISED BY THE TESTIMONY OF DONNA BUECHE WITH RESPECT TO WHETHER LORENZO POWELL'S EMERGENCY ROOM NURSE'S AIDE POSITION "AIDED IN ACCOMPLISHING" POWELL'S SEXUAL ABUSE OF PLAINTIFF/APPELLANT. THEREFORE, UNDER THE RESTATEMENT OF AGENCY 2d §219(2)(d), THERE WAS A FACT QUESTION AS TO DEFENDANT/APPELLEE'S LIABILITY. THE MICHIGAN COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT'S DENIAL OF DEFENDANT/APPELLEE'S SUMMARY DISPOSITION AND DIRECTED VERDICT MOTIONS, THEREBY OVERTURNING THE \$1.25-MILLION VERDICT WON BY PLAINTIFF/APPELLANT.....	1
B. ON APPEAL IN <u>ZSIGO</u> , THE MICHIGAN COURT OF APPEALS DID NOT ERR IN HOLDING THAT THE RESTATEMENT OF AGENCY 2d §219(2)(d) APPLIES TO ACTIONS IN TORT IN MICHIGAN.....	5
C. THE ARGUMENTS ASSERTED BY DEFENDANT/APPELLEE IN SECTION I(E) THROUGH I(G) OF DEFENDANT/APPELLEE'S BRIEF BEFORE THE MICHIGAN SUPREME COURT ARE NOT APPROPRIATELY RAISED. THIS FOLLOWS FROM THE FACT THAT THE MICHIGAN COURT OF APPEALS NEVER REACHED THESE ISSUES IN ITS OPINION DISPOSING OF THIS CASE. IF THE SUPREME COURT AGREES WITH PLAINTIFF/APPELLANT WITH RESPECT TO THE ISSUE ASSERTED BY PLAINTIFF/APPELLANT ON APPEAL, THE MICHIGAN SUPREME COURT SHOULD REMAND THIS CASE TO THE MICHIGAN COURT OF APPEALS TO ALLOW THE MICHIGAN COURT OF APPEALS TO RULE ON THE ISSUES RAISED BY DEFENDANT/APPELLEE AT SECTIONS I (E) THROUGH I(G) OF DEFENDANT/APPELLEE'S BRIEF.....	8

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INDEX OF AUTHORITIES

Federal Case Law

<u>Costos v Coconut Island Co.</u> 137 F.3d 46 (1 st Cir. 1998).....	4
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State Case Law

<u>Detroit v Hospital Drug Co.</u> 176 Mich App 634, 644, 440 NW2d 622 (1988).....	1
<u>Falk v Civil Service Commission</u> 57 Mich App 134, 137-138, 2215 NW2d 702 (1974).....	9
<u>Hatfield v St. Mary's Medical Center</u> 211 Mich App 321, 325, 535 NW2d 272 (1995).....	2
<u>Howard v Canteen Corp.</u> 192 Mich App 427, 431, 481 NW2d 718 (1992).....	1
<u>Matras v Amoco Oil Co.</u> 424 Mich 675, 681-682, 385 NW2d 586 (1986).....	1
<u>Orzel v Scott Drug Co.</u> 449 Mich 550, 557, 537 NW2d 272 (1995).....	2
<u>Phinney v Pearlmutter</u> 222 Mich App 513, 525, 564 NW2d 532 (1997).....	1

Treatises

Restatement of Agency 2d §219(2)(d).....	3-6, 8-10
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I. REPLY ARGUMENTS

A. THE MICHIGAN COURT OF APPEALS ERRED IN HOLDING THAT, WHERE THE TRIAL COURT TOOK THE FACTS IN THE LIGHT MOST FAVORABLE TO PLAINTIFF, A FACT QUESTION WAS NOT RAISED BY THE TESTIMONY OF DONNA BUECHE WITH RESPECT TO WHETHER LORENZO POWELL'S EMERGENCY ROOM NURSE'S AIDE POSITION "AIDED IN ACCOMPLISHING" POWELL'S SEXUAL ABUSE OF THE PLAINTIFF/APPELLANT. THEREFORE, UNDER THE RESTATEMENT OF AGENCY 2d §219(2)(d), THERE WAS A FACT QUESTION AS TO DEFENDANT/APPELLEE'S LIABILITY. THE MICHIGAN COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT'S DENIAL OF DEFENDANT/APPELLEE'S SUMMARY DISPOSITION AND DIRECTED VERDICT MOTIONS, THEREBY OVERTURNING THE \$1.25-MILLION VERDICT WON BY PLAINTIFF/APPELLANT.

Defendant next contends that the Court of Appeals correctly held that there was an absence of a fact question as to whether Powell was aided by his agency relationship in molesting Plaintiff. Defendant contends that Plaintiff has misconstrued and misapplied the testimony of Defendant's Emergency Room Head Nurse Donna Bueche with respect to this issue.

The Court of Appeals held that the Trial Court should have granted Defendant a Directed Verdict. The Court of Appeals held that the Trial Court abused its discretion in denying Defendant's Motion for a Directed Verdict. In reviewing Directed Verdict denials, the Court of Appeals is obliged to employ an abuse of discretion standard. Howard v Canteen Corp., 192 Mich App 427, 431, 481 NW2d 718 (1992); Phinney v Pearlmutter, 222 Mich App 513, 525, 564 NW2d 532 (1997); Matras v Amoco Oil Co., 424 Mich 675, 681-682, 385 NW2d 586 (1986); Detroit v Hospital Drug Co., 176 Mich App 634, 644, 440 NW2d 622 (1988).

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At pages 16-20 of Plaintiff's Brief on Appeal Plaintiff discusses Bueche's testimony. Specifically, Ms. Bueche testified that, "Patients – I mean like, visitors would not go in to that room." (Bueche Deposition, Appendix, pg. 71a). Furthermore, she testified:

Q. So Mr. Powell, by virtue of his job, had the right to enter the room as opposed to a non-employee who would not have the right, correct?

A. Correct. (Bueche Deposition, Appendix, pg. 71a).

At pages 20-24 of Defendant's Brief on Appeal, Defendant seeks to offer its interpretation of the Bueche testimony. What could be more obvious than the proposition that the correct construction of a witness' testimony is a question **for the jury**? Nothing is more fundamental than the proposition that – with respect to Summary Disposition or Directed Verdict Motions – the non-movant is entitled to all reasonable inferences. See Orzel v Scott Drug Co., 449 Mich 550, 557, 537 NW2d 208 (1995); Hatfield v St. Mary's Medical Center, 211 Mich App 321, 325, 535 NW2d 272 (1995). Surely, one reasonable construction of the Bueche testimony justifies the conclusion that Powell's agency relationship aided Powell in accomplishing Plaintiff's molestation.

For the reasons stated at pages 16-20 of Plaintiff/Appellant's Brief on Appeal, the Bueche testimony raises a fact question as to whether Defendant supplied Powell with near unique specific access to Plaintiff (i.e., with the instrumentality for commission of the tort against Plaintiff). Based on the Bueche testimony, there is a genuine issue of material fact that Powell's omnibus position of authority in the Emergency Room afforded Powell unrestricted access to

Plaintiff's room. It gave Powell the instrumentality and knowledge to re-enter the Plaintiff's room through the bathroom door. Upon re-entry, of course, Mr. Powell had access to the helpless, bound and restrained Plaintiff. The Bueche testimony cited by Defendant merely shows that there is a fact question as to whether Bueche's testimony arguably establishes Powell was aided in committing the torts on Plaintiff.

It is interesting to note Defendant's Counter-Statement of Material Proceedings. There, Defendant makes the dubious argument that the bound and restrained Plaintiff, while in the throes of an emotional breakdown, "consented" to her molestation. This was Defendant's chief argument at trial. See, e.g., Supplemental Appendix, 3a-7a, TT Vol. V p. 726-730.

Indeed, Defendant spent little time contending that Plaintiff's room was readily accessible to all, or that the bathroom door through which Powell stealthily entered was accessible to all. Instead, Defendant featured the consent argument – a truly weak argument in light of the condition and restraint of Plaintiff.

In any event, it was for the **jury** to determine the significance of Bueche's testimony as applied to the Restatement of Agency 2d §219(2)(d).

Plaintiff strongly argued the significance of the Bueche testimony in Plaintiff's Motion for Rehearing in the Michigan Court of Appeals. Judge White then changed her mind, and voted to grant Plaintiff's Motion for Rehearing. This changed vote reflected the fact that the Bueche testimony had not been considered by the Court of Appeals in its Opinion. Given that this Court agrees

that Restatement of Agency 2d §219(2)(d) applies to this case, there clearly was a fact question as to Defendant's liability.

Defendant would have the Restatement of Agency 2d §219(2)(d) completely read out of the law in Michigan. A Plaintiff could **never** get to the jury by way of the Restatement where an employee had committed job site torts on the Plaintiff. Defendant's position is, in effect, that there is no such thing as employer liability where an employee acts outside the scope of his employment. If that viewpoint is accepted, Restatement of Agency 2d §219(2)(d) simply does not apply in Michigan.

But, the Zsigo Court of Appeals held that this Restatement provision **does apply** in Michigan. Given that this holding was correct, Bueche's testimony raises a fact question as to whether Defendant can be held liable in this case.

Defendant also refers to the Federal First Circuit case of Costos v Coconut Island Co., 137 F.3d 46 (1st Cir. 1998). Defendant contends that Costos is distinguishable from this case because the culpable night manager in Costos could enter the victim's hotel room with the hotel's master key. In fact, Costos strongly supports Plaintiff's Restatement of Agency 2d §219(2)(d) argument.

In Zsigo, the Bueche testimony supports the proposition that Powell had unique access and knowledge to the bound and restrained Plaintiff. Powell's job gave him this access with respect to entering Plaintiff's room **and** with respect to entering through the otherwise inaccessible bathroom door that led Powell to the bound and restrained Plaintiff. This access is similar to the access enjoyed by the Costos night manager.

Defendant fails to recognize that the Bueche deposition must be read in the light most favorable to Plaintiff. Inconsistencies and different interpretations of the Bueche testimony cannot justify the Court of Appeals' act of taking this case from the jury. It was the jury's duty to reconcile inconsistencies and make interpretations of the Bueche testimony. The Beuche testimony justified the Trial Court's denial of Defendant's Directed Verdict and Summary Disposition Motions. Therefore, the Court of Appeals May 4, 2004 Opinion should be reversed by this Court.

B. ON APPEAL IN ZSIGO, THE MICHIGAN COURT OF APPEALS DID NOT ERR IN HOLDING THAT THE RESTATEMENT OF AGENCY 2d §219(2)(d) APPLIES TO ACTIONS IN TORT IN MICHIGAN.

Defendant argues, extravagantly, that if "Hurley Medical Center is held vicariously held liable for the alleged sexual activity of its employee under the circumstances of this case, it will be tantamount to adopting strict liability for any act committed by an employee at work." Defendant's Brief on Appeal, pgs. 12-13. This is sheer nonsense – hyperbole to the extreme. To find for Plaintiff, this Court does not need to expand an employer's potential liability for the acts of its employees. The Court only needs to find, under the very narrow and unusual fact situation presented in this case, that the Trial Court did not abuse its discretion by ruling that there was a genuine issue of material fact as to whether the emergency room nurse's aid position aided Lorenzo Powell in accomplishing his sexual molestation.

The Restatement of Agency, 2d §219(2)(d) states that an employer is subject to liability for the acts of its agents acting outside the scope of their employment

when their employment "aided in accomplishing the tort by the existence of the agency." Situations in which liability can be assessed against an employer under §219 (2)(d) are surely narrow. But the unique facts of the case at bar fit within the Restatement parameters. In this case:

- On July 9, 1998, Plaintiff was taken by police to Defendant's Crisis Center due to her severe mental breakdown. She was then put in a shackle and brought to the emergency room. TT, Appendix, pg. 46a.
- Plaintiff was taken to a back room in the emergency room of Defendant in the throes of a psychotic breakdown. TT, Appendix, pgs. 46a, 50a, 51a.
- While there, she was restrained in a 4-point leather restraint making her uniquely vulnerable to abuse. Plaintiff also had to be catheterized requiring exposure of her genital area. TT, Appendix, pgs. 51a.-52a.
- Very few people had access to the room into which she was taken. Bueche Deposition, Appendix, pgs. 70a-72a.
- However, Nurse's Aid, Lorenzo Powell, had omnibus duties and responsibilities to service patients and access the rooms in which the patients were kept. The Nurse's Aid position gave Powell the power to answer call lights, bring materials to patients, transport patients to the floor, participate in the discharge of patients, clean patients' rooms and perform a wide array of other duties. Head nurse Donna Bueche testified that the position of emergency room nurse's aid was very important. Bueche Deposition, Appendix, pgs. 73a-74a.

- The nurses then left Plaintiff's room, but Nurse's Aid Lorenzo Powell remained behind -- alone with the deranged, bound and restrained Plaintiff -- pursuant to his omnibus duties and access to her room. TT, Appendix, pg. 53a.
- Powell then digitally penetrated the bound and restrained Plaintiff. After that he exited the room. TT, Appendix, pg. 54a.
- Powell then reentered Plaintiff's room by way of an adjoining room made known to him by virtue of his nurse's aid employment position. TT, Appendix, pg. 55a.
- Plaintiff, in her psychotic state of mind, thought that Powell was a very powerful person with the Defendant and begged that he release her. Powell then pointed to his penis, pulled his erect penis from his pants and stuck it in the mouth of the bound and restrained Plaintiff. Powell ejaculated and then left the room. TT, Appendix, pgs. 54a-56a.

These facts are egregious and extreme. This Court may never again confront a fact situation in which the servant's employment position so thoroughly granted the employee the power to abuse a helpless victim. It is absurd to argue, as Defendant does, that this Court will open the floodgates of litigation if it upholds the Trial Court's denial of Defendant's Motion for Directed Verdict. Upholding the Trial Court's original denial of Defendant's Motion will not result in any additional litigation. It will merely reinstate the just verdict rendered by the jury under the unique facts of this case.

On page 45 of its Brief on Appeal, Defendant further argues that the application of Restatement of Agency 2d §219(2)(d) should be limited to "non-physical" torts. However, Defendant cites no caselaw, Michigan or otherwise, for the proposition that Restatement of Agency 2d §219(2)(d) should be interpreted in this manner. There is also no support in the language of Restatement of Agency 2d §219(2)(d) itself. This Court should decline Defendant's invitation to attach such a novel addendum to §219(2)(d) now.

C. THE ARGUMENTS ASSERTED BY DEFENDANT/APPELLEE IN SECTION I(E) THROUGH I(G) OF DEFENDANT/APPELLEE'S BRIEF BEFORE THE MICHIGAN SUPREME COURT ARE NOT APPROPRIATELY RAISED. THIS FOLLOWS FROM THE FACT THAT THE MICHIGAN COURT OF APPEALS NEVER REACHED THESE ISSUES IN ITS OPINION DISPOSING OF THIS CASE. IF THE SUPREME COURT AGREES WITH PLAINTIFF/APPELLANT WITH RESPECT TO THE ISSUE ASSERTED BY PLAINTIFF/APPELLANT ON APPEAL, THE MICHIGAN SUPREME COURT SHOULD REMAND THIS CASE TO THE MICHIGAN COURT OF APPEALS TO ALLOW THE MICHIGAN COURT OF APPEALS TO RULE ON THE ISSUES RAISED BY DEFENDANT/APPELLEE AT SECTIONS I(E) THROUGH I(G) OF DEFENDANT/APPELLEE'S BRIEF.

Sections I(E) through I(G) of Defendant's Brief on Appeal appear at pages 29-44. But these sections deal with issues that were never considered by the Michigan Court of Appeals.

It is true that Plaintiff contended that Powell's molestation of a second bound and restrained mentally ill patient – Laura Schuman – supported the proposition that Powell's job afforded Powell special access to bound and restrained mentally ill patients in Defendant's Emergency Room. But Defendant argues that it was error for the Trial Court to consider the Schuman evidence under Rule 404(b) of the Michigan Rules of Evidence.

Plaintiff respectfully refers this Court to the Exhibit 1 May 4, 2004 Court of Appeals Opinion in this case. The Court of Appeals never considered the Schuman issue. Furthermore, the Court of Appeals never considered the other issues raised in Sections I(E) through I(G) of Defendant's Brief. The Court of Appeals Opinion turned solely on the proposition that Plaintiff failed to produce adequate evidence to raise a fact question as to Defendant's liability under the Restatement of Agency 2d §219(2)(d).

Any Appellate Court – including the Michigan Supreme Court – fulfills the function of adjudicating questions that have been raised and **decided** by the Court below it. This is a fundamental principle of appellate jurisprudence. See Falk v Civil Service Commission, 57 Mich App 134, 137-138, 215 NW2d 702 (1974). The Michigan Supreme Court obviously should not resolve the issues raised by Defendant in Sections I (E) through I (G) of Defendant's Brief.¹

If the Michigan Supreme Court decides that the Court of Appeals May 4, 2004 should be reversed, the Supreme Court should then remand this case to the Court of Appeals for consideration of the issues that were not considered by the Court of Appeals in the May 4, 2004 Opinion. If this Court were to do otherwise, this Court would, effectively, be acting as an Appellate Court with respect to the Trial Court – rather than as an Appellate Court with respect to the Michigan Court of Appeals.

¹ Plaintiff has not discussed the issues raised by Defendant in Sections I (E) through I (G) of Defendant's Brief. Plaintiff has not done so for the obvious reason that the Opinion Plaintiff is challenging in the Supreme Court – the Michigan Court of Appeals May 4, 2004 Opinion – never considered these issues.

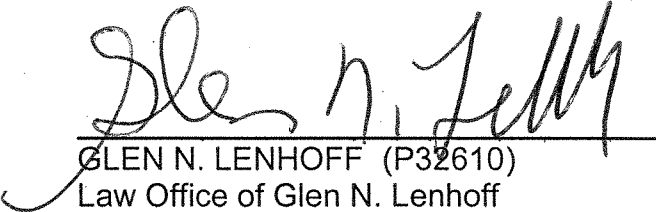
RELIEF REQUESTED

Plaintiff contends that Defendant's Brief on Appeal, if anything, reinforces the proposition that a jury question was presented with respect to the issue of whether Powell's positions as one (1) of two (2) Emergency Room Nurse's Aide on the night Plaintiff was molested afforded Powell with the ways and means to accomplish the sexual molestation of Plaintiff within the scope of the Restatement of Agency 2d §219(2)(d). The alleged inconsistencies in Bueche's testimony were for the jury to weigh.

For the reasons stated in Plaintiff's Brief on Appeal and in the present Brief, Plaintiff respectfully requests that the Michigan Supreme Court reverse the May 4, 2004 Opinion of the Michigan Court of Appeals and then remand this case to the Michigan Court of Appeals for consideration of the remaining issues raised by Defendant on Appeal.

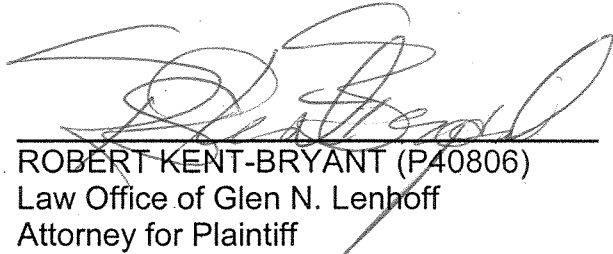
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